No. SC87722

IN THE SUPREME COURT OF MISSOURI

PRESIDENT RIVERBOAT CASINO-MISSOURI, INC.,

Petitioner/Cross-Respondent

v.

DIRECTOR OF REVENUE,

Respondent/Cross-Petitioner

On Petition for Review

From The Administrative Hearing Commission

Hon. John J. Kopp, Commissioner

CROSS-RESPONDENT AND REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT PRESIDENT RIVERBOAT CASINO-MISSOURI, INC.

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A. *The Court May Affirm On Any Ground Supported By The Record And Raised In The Administrative Hearing Commission*

The Director contends that the Administrative Hearing Commission erred in deciding that President Riverboat Casino-Missouri, Inc. was entitled to a refund of sales taxes paid on food it gave away to its patrons — known as "comps" — to induce them to play slot machines and other gaming equipment because the cost of the free food was not factored into the price of the food the casino sold that was subject to the sales tax. President agrees that the evidence does not show that the cost of the comped food was factored into the sale price of the food sold at its restaurants. That does not mean that the Court must reverse the Commission's decision on the food comps.

There was ample evidence to support the Commission's finding that President factored the cost of the comped food into determining the amount of the payouts it would make on its slot machines and other gaming activities. T-1, 29. The Commission rejected President's contention that § 313.822 RSMo 2000 requires the gaming tax to operate like the sales tax, including the resale exclusion. L.F. 81, App. A34. The Court, however, is not bound by the Commission's interpretation of the law.

Mackey v. Director of Revenue, 200 S.W.3d 521, 523 (Mo. banc 2006). As with an appeal from the circuit court, the Court may affirm the Commission's decision on any ground supported by the record that was raised below, particularly where the result depends upon an issue of law. *See, e.g., Miller v. O'Brien*, 168 S.W.3d 109, 112 (Mo. App., W.D. 2005).

B. *The Plain Meaning Of § 313.822 Is That The Gaming Tax Is To Operate Like The Sales Tax, Including Its Exclusions And Exemptions.*

Both the Director and the Commission acknowledge that the Missouri General Assembly adopted essentially the same language in the gaming tax statute as it did in the statutes that authorize the local sales taxes (L.F. 74-77, A27-A30; Resp.Br. at 48). In the gaming tax statute, § 318.822 states that "all functions incident to the administration, collection, enforcement, and operation of the tax imposed by §§ 144.010 to 144.525 RSMo, shall be applicable to the taxes and fees imposed by this section." Local sales taxes are authorized pursuant to § 32.087 RSMo Supp 2004, which contains similar language: "the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax" (§ 32.087.6), and "all applicable provisions contained in sections 144.010 to 144.525, RSMo, governing the state sales tax … shall apply to the collection of any local sales tax imposed under the local sales tax law" (§ 32.087.7).

The General Assembly mandated that the gaming tax is to operate in accordance with §§ 144.010 to 144.525. This mandate necessarily incorporates the sales tax resale

exclusion found in Section 144.010.1(10). That the gaming statute does not contain other clarifying references to specific statutes contained within §§ 144.010 to 144.525 is not relevant because there is no ambiguity in the statute regarding the applicability of the resale exclusion to the gaming tax.

When statutory language is "clear, unambiguous, and admits of only one meaning, there is no room for construction." *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266 (2005), *citing Corvera Abatement Technologies v. Air Conservation Commission*, 973 S.W.2d 851, 858 (Mo. banc 1998). Moreover, "[t]ax laws are to be strictly construed and if the right to tax is not conferred by plain language, it will not be extended by implication." *United Air Lines, Inc. v. State Tax Commission*, 377 S.W.2d 444, 449 (Mo. banc 1964). Even if there were a reasonable doubt as to this interpretation of the gaming tax statute, the doubt must be resolved in favor of the taxpayer; in this situation, President. *Id*. at 448.

President's position is simple: § 313.822 directs that the gaming tax operate like the sales tax. The statute incorporates the administrative, collection and enforcement provisions of the Sales Tax Law — as previously noted, even the Director concedes that. *See* Resp.Br. at 48. But the statute also directs that the gaming tax "operate" like the sales tax.[1]

[1] The Director's argument concerning the meaning of § 313.822 is found in the Respondent's section of her Brief relating to gaming equipment. The Director made the same contentions regarding the food comps before the Commission, and we assume her

The Director criticizes President for using the dictionary definition of "function" and "operation," the key words in the statute. Resp.Br. at 49. Section 1.090 RSMo 2000 requires the Court to consider statutory terms that the legislature has not defined in their plain, ordinary and usual sense. A dictionary provides such a plain meaning. *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2003).

The Director offers no definition of "operation" of her own, from a dictionary or anywhere else. She says that the gaming statutes do not provide the "numerous, detailed provisions for administering and collecting the [gaming] tax that have already been incorporated into the sales tax law." Resp.Br. at 47. This may be true, but § 313.822 takes care of this in specifically providing that "all functions incident to the administration [and] collection" applicable to the Sales Tax Law shall also be applicable to the gaming tax.

The Director invokes the canons of statutory construction, but those are not needed if the statute's meaning is plain. In any event, she cites the wrong statutes, and misapplies those which she cites.

The Director's position seems to be that operation, administration, and collection are all equivalent terms. By failing to give meaning to every word in the statute, the Director

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position has not changed. In this section, President discusses the application of the statute to comped food. President's additional arguments concerning gaming equipment are in its Reply Brief, *infra*.

violates the first principle of statutory construction: to effect the intent of the legislature by giving every word its plain and ordinary meaning. Where the legislature uses different words, it intends that they have different meanings. *Nelson v. Crane,* 187 S.W.3d 868, 870 (Mo. banc 2006). Therefore, "operation" cannot mean "administration," "collection" or "enforcement."

The Director says that § 313.822 should be interpreted *in pari materia* with other statutes concerning the assessment, levy, and payment of taxes. Resp.Br. at 48-49. Based upon this principle, the Director claims that President's interpretation would effectively repeal other provisions that show that the legislature intended the gaming tax and the sales tax to "operate independently of each other." Resp.Br. at 49.[2] She does not specify what statutes she means, or how they support her claim other than a vague reference to "the statutory provisions discussed above." Resp.Br. at 49. The only statutory provisions "discussed above" — besides the administrative and collection provisions of the sales tax law, which the Director agrees are incorporated in the gaming tax — are §§ 313.085, 313.321.5 and 313.821 RSMo 2000.

Section 313.085 exempts bingo supplies and equipment from the sales and use tax. The relevance of this exemption is not apparent. The gaming tax, by its terms, applies only to "adjusted gross receipts received from gambling games authorized pursuant to §§ 313.800 to 313.850." § 313.822.1. No one is suggesting that the gaming tax applies to

[2] The Director's Brief does not say what she means by "operate" in this sentence.

bingo games. We also note that the only certain religious, charitable, fraternal, veteran or service organizations can be licensed to conduct bingo games. § 313.010. Many of those organizations would be entitled to an exemption from sales taxes anyway. *See* § 144.010(19) RSMo 2000.

Section 313.321.5 exempts the sale of lottery tickets from state and local sales taxes. The lottery is a State-conducted activity. It is not surprising that the State has chosen not to allow taxation of its own activities, presumably to encourage persons to buy lottery tickets. This statute has no relation to the gaming activities on excursion gambling boats.

Section 313.821 exempts the $2 admission fee from state and local sales taxes. The $2 "admission fee" is actually a tax. *President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Commission*, 13 S.W.3d 635, 638 (Mo. banc 2000). That the legislature has chosen not to impose sales taxes on a tax the casino is required to collect is not surprising either.

Moreover, the casino admission fee is not part of the casino's gross receipts or adjusted gross receipts, and therefore these fees are not subject to the gaming tax. The casino pays a $2 fee for each person who boards and remits the entire amount to the State. The State then divides the fee (or tax) between the Gaming Commission and the home dock city or county. § 313.820.1. If a casino is not entitled to retain any part of an amount collected on behalf of the State, that amount is not part of the casino's gross receipts. *See, e.g., Parkway Motors, Inc. v. Thompson*, 825 S.W.2d 302, 304 (Mo. banc 1992).

C. *The Resale Exclusion Is Part Of The Operation Of The Sales Tax, And The Comped Food Was Purchased For A "Sale At Retail"*

Section 313.822 says that the gaming tax operates like the sales tax. That means the resale exclusion in the Sales Tax Law, § 144.010.1(10), operates in the same way on transactions subject to the gaming tax as the sales tax operates on transactions subject to the sales tax.

If the cost of the comped food is later included in a "sale at retail," then it can only be taxed once. *See, e.g., Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 530 (Mo. banc 2003). That "one-time tax" is imposed by § 313.822, the 20% gaming tax on the casino patrons' losses, or the casino's winnings.

To understand how comped food fits into the "sale at retail" framework, we must first explain in detail how a casino works.

The original concept of casino gaming in Missouri was that patrons would play at slot machines or table games while on a riverboat "cruise" or "gambling excursion." *See* § 313.800(9); *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 65 (Mo. banc 1994) and *Akin v. Missouri Gaming Commission*, 956 S.W.2d 261, 263 (Mo. banc 1997). Although none of the casinos actually cruises anymore, casinos are required by § 313.820.1 to keep track of each patron's gaming sessions for purposes of Missouri's loss limit. An excursion is deemed to be a two hour gaming session or less. Under § 313.505(3), a casino patron can only buy up to $500 of chips, tokens or credits during each two hour excursion.

In order to ensure that the statutory loss limit requirements are met, the casino must enter certain personal information about each patron into its tracking system. When a patron comes to President for the first time, the casino enters the patron's name and address and, at the patron's option, the patron's social security number into its tracking system. T-1, 17. The social security number is required only when a person wins more than $1,200. T-1, 17. In that case, President must either withhold personal income taxes from the winnings, or withhold the entire winnings if no social security number is produced. § 313.826. President issues to each patron a card with a magnetic stripe, much like a credit or debit card. T-1, 17. *See* Exhibit 11. The patron must present the card each time that he or she purchases chips, tokens or machine credits. T-1, 17.

Missouri law requires casinos to pay a $2 admission fee for each patron's excursion, *i.e.*, for each two hours or part thereof that the patron is at the casino. § 313.820.1; T-1, 18. President, like most of the State's other casinos, collects the $2 fee from the patron on his or her first visit, but pays the $2 charge itself for each patron's subsequent visits. T-1, 18. This $2 fee is not subject to the gaming tax, and is not at issue in this case.

President gives its patrons the option of allowing their "play" to be tracked. T-1, 18-19. A patron's "play" is the total amount that the patron wagers. T-1, 19. "Play" includes not just the chips, tokens or credits that the patrons pay for or "rent" and then wager, but also any winnings that a patron wagers or "reinvests" while gaming on President. T-1, 19. The amount of wagering at the slot machines is also referred to in the industry as "coin

in" or "slot handle." T-1, 19, 27; Exhibit 16. The amounts wagered at blackjack, poker, or other table games are referred to as "table drop." T-1, 27; Exhibit 16.

To induce patrons to have their play tracked, President offers to them certain benefits if the patron achieves certain levels of play or wagering. President generally awards to patrons who have their play tracked one point for each dollar wagered. T-1, 20. Patrons who earn certain levels of points can receive various benefits, such as coupons redeemable for chips, tokens or credits that can be wagered at future sessions or, as relevant here, complimentary or free meals (or "comps") at President's buffet or deli. T. 21.

For example, patrons who earn 90,000 points by wagering $90,000 in one year are awarded a Galaxy Blue Card, which entitles them to two comped buffet meals per month or two comped meals per month at the deli. T-1, 23-24; Exhibit 14. Patrons whose level of play reaches or exceeds 180,000 points in one year ($180,000) are awarded a Galaxy Silver Card, which entitles them to receive four comped buffet meals per month or four comped meals per month at the deli. T-1, 24-25; Exhibit 15.

President also sends out monthly mailings to its patrons which include coupons redeemable for various benefits, including comped meals. T-1, 22; Exhibit 13. The level of benefits a patron receives in the monthly mailing is directly tied to the amount of that person's play. T-1, 22. Those who wager more receive more comped meals and other benefits. The purpose for offering these benefits is to encourage patrons to return to President and to increase the patrons' "play" or wagering. T-1, 20.

President offers two broad categories of gaming activities. By far, slot machines are the most popular gaming activity. Patrons using the slot machines rent the tokens used in the machines at the casino. During and after 2000, President obtained new slot machines and software that permit the patron to pay for credits at the machine itself, without having to rent the tokens from the casino, by inserting their card and cash up to their loss limit. T-1, 39-40; Exhibits 5 and 6. The patron then wagers by choosing the number of credits he or she wishes to play on each "spin." T-1, 39.

Of course, only one person can sit at a particular spot at a gaming table at a time, and only one person can play a particular slot machine at any time. Patrons who earn Blue Cards or Silver Cards can have their favorite slot machine, or the one they are currently playing, "capped" or reserved for them for up to one hour. T-1, 24; Exhibits 14 and 15. This means that one of President's employees will turn that machine off and not permit any other patron to play it while the Galaxy Card holder is gone. T-1, 24. The Galaxy Card holder can use this "capped" time to eat, go to the restroom, or just take a break from playing. T-1, 24. Similarly, patrons who use the table games, such as poker or blackjack, exclusively occupy a position at the table while they are playing.

Section 313.822 imposes a tax of 20% on the casino's "adjusted gross receipts." The casino's adjusted gross receipts are the total "play" or wagers made, net of the amount paid to patrons in winnings. In other words, the casino's adjusted gross receipts are equal to what the patrons actually lose at the slots and tables. Each casino can determine, based on its own business and marketing strategy, how much as, a percentage of "play," it

wants to pay to its customers and how much it wants to retain as winnings. T-1, 29. The slot machines, for example, can be set to pay out a pre-determined percentage over a period of time based upon statistical probabilities. In the example used at the hearing, in July 2002 President's patrons wagered $78 million in the slot machines — the "slot handle" — of which 93.446% was won by the patrons and 6.554 % was lost by the patrons, or won by President. T-1, 28; Exhibit 16. The 20% gaming tax was imposed on the 6.554% net patron losses which President retained.

The parties agree that Missouri's sales tax resale exclusion may apply to free or "no-charge" items that were provided to the seller's customers, even though the items were not the main item or service being purchased or used. Resp.Br. at 25-28. To qualify for either the resale exclusion or the use tax exemption, there must be (1) a transfer, barter or exchange of (2) the title or ownership of either tangible personal property or the right to use, store or consume it (later also extended to taxable services as noted below) for (3) consideration paid or to be paid. *See, e.g., Aladdin's Castle v. Director of Revenue,* 916 S.W.2d 196 (Mo. banc 1996) (sales tax); *Sipco, Inc. v. Director of Revenue,* 875 S.W.2d 539, 542 (Mo. banc 1994) (use tax).

The seller does not need to prove that the customer paid a separate purchase price for the no-charge items or exactly what part of the seller's cost of the no-charge items was factored into the purchase price of the otherwise taxable primary items. *Sipco,* 875 S.W.2d at 542. Also, President's customers do not have to actually take possession of or

use the no-charge items so long as they had the option to do so. *Aladdin's Castle,* 916 S.W.2d at 198.

In *Aladdin's Castle,* the Court held that an arcade owner resold prizes its customers won by playing video games through their rentals of the taxable tokens. *See id.* at 198. In *Sipco,* the Court held that the dry ice used in packaging fresh meat products qualified for the resale exemption from use taxes because the butcher's customers took ownership of the dry ice along with the meat that they purchased. *Sipco,* 875 S.W.2d at 542.

In *Brambles Industries v. Director of Revenue,* 981 S.W.2d 568 (Mo. banc 1998), the Court held that a manufacturer's cost of pallets used to ship products to its customers qualified for the resale exclusion even though the taxpayer's customers paid the same price for the products with or without use of the pallets. The cost of the pallets was factored into the price paid for the taxable products. It did not matter that some of the taxpayer's customers did not choose to use the taxpayer's pallets for purposes of taking delivery of the taxable products. *See id.* at 571.

In *Kansas City Royals Baseball Corp. v. Director of Revenue,* 32 S.W.3d 560 (Mo. banc 2000), the Court held that giving away promotional items to induce fans to attend baseball games qualified for the resale exclusion. The cost of the items was factored into the cost of the tickets, which were subject to the sales tax. It did not matter that some of the fans did not receive or want to receive these free or promotional items. *See id.* at 563.

In *Kansas City Power & Light v. Director of Revenue,* 83 S.W.3d 548 (Mo. banc 2002), the Court held that an electric power company's sale of electricity to a hotel, to the

extent that it was used to heat, cool and power rented guest and meeting rooms, met the three-part test for the resale exclusion because the electric power company sold to the hotel customers the ability to use store or consume the electricity by adjusting the temperatures in the rented rooms in exchange for the taxable consideration paid for the rooms. It did not matter that some of the hotel's customers did not take advantage of their ability to adjust the temperature in their rented rooms because the hotel transferred to its customers the right to do so. *Id.* at 552-553. Finally, in *Ronnoco Coffee Co. v. Director of Revenue*, 185 S.W.3d 676 (Mo. banc 2006), the Court held that coffee making machines loaned to a coffee maker's customers were "sold at retail" because the cost of the machines was factored into the cost of the coffee.

Here, President's patrons pay for or "rent" tokens, chips or machine credits to play at the slots or tables. President provides no-charge, comped meals to those patrons whose amount of wagering (or play) reaches a certain level, in order to induce them to return and play even more. The "cost" to casino patrons is the amount they lose. The casino can adjust the odds to increase or decrease the amount of the patrons' losses (or the casino's winnings) over a given period of time based upon principles of statistics and probability. For example, President can adjust the slot machines so that they pay out a greater or lesser percentage of the play or slot handle. T-1, 29. Of course, many factors enter into the decision to set the odds at a certain level. But among the factors considered are the casino's costs, including the cost of the comped meals that President must recover through encouraging increased play by the patrons to whom the comped meals are

offered. T-1, 29. The comped meals are thus purchased for resale, with the patrons' losses being the equivalent of a "sale at retail" in the usual sales tax transaction.

The casino pays the gaming tax on the patrons' losses (or, conversely, the casino's winnings — they are the same thing). Because the cost of the comped meals is factored into what the patrons pay (*i.e.*, what the casino is taxed upon), the food used for the comped meals is not subject to sales tax when the casino buys it. It is purchased by President for resale, and taxed when the patrons to whom the meals are given lose money at the slots or table games.

Thus, the comped food is sold at retail in the same manner as other promotional items because its cost is figured into the "price" of gaming, *i.e.*, the casino's adjusted gross receipts representing what casino patrons pay to play. The comped food is taxed by the gaming tax on the transactions.

D. *The Gaming Tax Is Not An Occupational License Tax*

The Director contends that the gaming tax is an occupational license tax rather than a sales tax because the base subject to the gaming tax is the casino's gross receipts, not what it charges the patron for playing. Resp.Br. at 45-46, *citing Anderson v. City of Joplin*, 646 S.W.2d 727, 728 (Mo. Banc 1983) and *Suzy's Bar & Grill, Inc. v. Kansas City*, 580 S.W.2d 259, 261-262 (Mo. banc 1979). The Director is mistaken. As *Suzy's Bar & Grill* makes clear, an occupational license tax is based upon *all* receipts or revenue received by the licensee.

A casino's "gross receipts" are "the total sums wagered by patrons of licensed gambling games," § 313.800(13), or the patrons' total "play" or "handle." *See*, *e.g.*, Exhibit 16. The gaming tax, however is not imposed on a casino's gross receipts, but on its "adjusted gross receipts" from just the gaming activity. § 313.822. A casino's adjusted gross receipts are "the gross receipts from licensed gambling games and devices less winnings paid to wagerers." § 313.800(1); Exhibit 16. (President also pays sales tax on food and retail items sold to its patrons. Receipts from these sales are not included in "adjusted gross receipts" and they are not subject to the gaming tax.)

Thus, the gaming tax is based upon what the patrons *lose*. In other words, the tax is imposed upon what the patrons pay to play. The tax base for both the sales tax and the gaming tax is, in the aggregate, equal to what their respective customers actually pay for their goods or services, net of refunds, discounts and price reductions, for any given tax period. Not every casino patron pays the gaming tax because on individual occasions a patron will win more than he or she loses. But those situations are comparable to a refund of a sale of property by a retail store. Therefore, the gaming tax has the same tax base as the sales tax, albeit adapted to the gaming situation. It is functionally the same as, and operates in the same manner as, a sales tax.

E. *Other Statutes Using Similar Language Confirm That The Gaming Tax Is To Operate Like The Sales Tax Regarding Exclusions And Exemptions*

The statutory command in other statutes that other taxes, such as local sales taxes, are to "operate" like the state sales tax law confirms President's interpretation. The language

found in these statutes (cited at page 22 of President's Opening Brief) means that the Director must treat local sales and use taxes in exactly the same manner as it treats the state sales and use tax, including the initial determination of whether property or a transaction is subject to either tax. In other words, the "operation" of the local sales or use tax must be the same as the "operation" of the state sales or use tax. To achieve the required conformity, a particular property that is exempt or excluded from the state sales tax also must be exempted or excluded from the local sales or use tax.

Included in the "operation" of the sales tax law is the operation of the exclusions and exemptions from the imposition of sales and use taxes found in Chapter 144. A municipality, for example, cannot impose a local sales tax on a transaction that the state sales tax law excludes from the imposition of the state sales tax. Thus, a municipality cannot impose a local sales tax on the purchase of items for resale — but it can impose a local sales tax on the sale of the items at retail. As relevant here, the statutory command that the gaming tax "operate" like the sales tax means that any otherwise taxable item or taxable service that President purchases for resale to its patrons in exchange for their play qualifies for the resale exclusion under the sales tax law.

II. *The Statute Of Limitations Does Not Bar The Refund Claims Because No Refund Of Use Tax Can Be Credited Against The Alleged Sales Tax Liability Until The Director Makes An Assessment Of Sales Tax (Responds To Point II)*

The Director claims that the statute of limitations ran on President's refund claim for food comps for the periods January 1995 through November 1995 and January 1998

through February 1998 because the audit waivers do not cover those periods. Resp.Br. at 32-39. (The statute of limitations issue as it relates to the gaming equipment depends on different facts, as discussed in the Reply Brief, *infra*). Although it is not clear whether the Director also challenges President's refund claim for the entire period of January 1998 through September 2000, as she did in the Commission, we assume that she does.

The existence of waivers is irrelevant to the timeliness of the refund claims for comped food. The Director's contentions as to each of these periods fail to recognize the difference between use taxes and sales taxes. President paid *use* taxes on the comped food in January 1995 through November 1995, and January 1998 through September 2000. It did not, and could not, pay *sales* taxes on the comped food for those periods until the Director's auditor assessed the sales taxes.

The Director assessed and collected sales taxes for 1995 on July 3, 2003. *See* Ex. 8 (Letter from Frank Gregg, Sales/Use Tax Auditor to Curtis B. Reckmann). As a result of the field audit, the Director refunded $223,560.79 in *use* taxes paid during the entire period January 1, 1995 through December 31, 1997. The Director then assessed $200,693.25 in *sales* taxes on comped food for the same period. That is made clear by the letter and the attached Forms 472B, prepared and signed by Mr. Gregg. Mr. Gregg also assessed sales tax and offset that alleged liability against President's use tax refund for January 1998 through September 2000. Those offsets were made on December 24, 2002 and January 3, 2003. Exhibit 18 summarizes the offsets, and Exhibits 19-22 provide the supporting documentation.

The Director refers to Exhibit 23, where President sought refunds of use taxes for January 1998 through September 2000 in a series of letters. Each of the letters points out four errors in the computation of the use tax: two errors where discounts were improperly counted as part of "comp revenue," one error where the cost of alcohol and tobacco — which may not be comped by law — were included, and an error in the computation of the use tax where the cost of the comped meals included the amount of sales tax that would have been charged had the meal been paid for, instead of provided at no charge.

The letters clarify that these were all adjustments to the use taxes, and that future computations of the sales tax owed (as directed by Mr. Gregg) would also have to avoid these problems. The refund claims at issue in these letters, however, were for the refund of *use* taxes, not *sales* taxes. Indeed, as Exhibits 18 and 22 show, President had not paid any sales tax on the comped meals at the time the letters were written. To the extent that the letters state that certain items were going to be reported correctly on the sales tax returns, that is not a bar to a later refund. *See, e.g.*, *Director of Revenue v. Westinghouse Credit Corp.,* 787 S.W.2d 715, 718 (Mo. banc 1990)(Even where a taxpayer actually knows of the basis for a refund at the time it files its return, it does not waive its statutory right to seek the refund by paying the tax and later requesting a refund.)

In short, the relevant fact is *when* the payment of the *sales* tax was made. The refunds related to the letters in Exhibit 23 were not made until December 2002 and January 2003, as noted above and on Exhibit 18.

For both periods the auditor refunded the use taxes, and then applied the refund to the sales taxes he claimed were due. Thus, the *sales* taxes on the food comps for which President seeks a refund were not paid until just a few weeks before it filed for its refund of *sales* taxes in March 2003 and April 2003 as to one period, and before the final assessment and payment as to the other.

The Director says that the three year statute of limitations began to run when President paid "taxes" on the comped food. The Director's Brief never mentions *what* tax was paid — but it was the *use* tax. The Director relies on *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458 (Mo. banc 2003). In *Ford*, the taxpayer sought a refund of use taxes it had paid more than three years before the refund claim for use taxes was filed. The Court held that the three-year limitation period of § 144.190.2 "is started when the taxpayer remits payment of tax on the transactions that generate the issue of the overpayment." *Id*. at 462.

Ford does not compel rejection of President's refund claims for these periods on limitations grounds. The question is when was the applicable tax payment made. Here, President first paid use taxes on the comped food. The Director determined that President did not owe use taxes, but rather owed sales taxes on the comped meals. The Director then compelled President to file sales tax returns for each of the periods, and assessed sales taxes on all such comps in December 2002, January 2003, and July 2003. At the moment the Director required President to pay the sales taxes on the comped meals by

offsetting the use tax refunds against the alleged sales tax liability — and not before — President paid the sales taxes that are at issue in this case.

This situation is virtually identical to that in *Dyno Nobel, Inc. v. Director of Revenue*, 75 S.W.3d 240, 243-244 (Mo. banc 2002). In *Dyno*, the taxpayer mistakenly paid use taxes when it should have paid sales taxes. Dyno filed a claim for refund for the use taxes erroneously paid. The Director did not assess the relevant amount of sales taxes against the seller of the utilities. Rather, the Director simply tried to offset Dyno's claim for refund for use taxes by the amount of the sales taxes that were owed by the seller of the utilities. Without an assessment of sales taxes, the Director could not offset that liability against the use tax refund. *See id.* at 243-244.

The sales and use taxes are complimentary but not the same tax. *See, e.g., id.* at 243. The "original" payments to which the Director refers were payments of *use* taxes, not the sales taxes at issue in this case. The *sales* taxes were not assessed until the Director forced President to file sales tax returns for those periods, and were not paid until the Director offset President's refund of *use* taxes against the alleged sales tax liability.

The Director says that President's claims should be time-barred because to do otherwise would "reward" it for its own mistake. Resp.Br. at 39. Taxing statutes are strictly construed against the taxing authority and in favor of the taxpayer. *Utilicorp United, Inc. v. Director of Revenue,* 75 S.W.3d 725, 735 (Mo. banc 2001). Before the Director can collect unpaid sales taxes, she must assess them against the taxpayer, even when the payment is made by offsetting an alleged tax liability against a refund. The

Court made that clear in *Shelter Mutual Ins. Co. v. Director of Revenue,* 107 S.W.3d 919, 923 (Mo. banc 2003), holding "when there is an alleged failure to remit taxes, the Director is required to make an assessment of the delinquent tax and give notice of the estimated assessment. This assessment *must be made before any refund can be credited toward the unpaid tax.*" (Emphasis added.)

In any event, the Director waived any claim that the statute of limitations barred President's refund for sales taxes assessed on the food comps for January 1995 to November 1995. The Director did not raise the alleged bar of § 144.190.2 in her Final Decision. *See* Exhibit 1. The only reason she gave was "denied per field Audit Bureau." Exhibit 1. That was a reference to Gregg's July 3, 2003 letter, Exhibit 8, which does not mention the alleged untimeliness of the claim for any period. Rather, the basis of Mr. Gregg's denial was the Director's contention that the gaming tax does not operate like the sales tax. *See* Exhibit 8.

In her answer, the Director said only "Deny. Some, if not all, of Petitioner's refund applications were filled [*sic*] beyond the three-year statute of limitations provided for in Section 144.190. *See Ford Motor Co. v. Director of Revenue,* 97 S.W.3d 458, 462 (Mo. banc 2003)." L.F. 17. She did not refer to any period in 1995. The only Final Decision that mentioned the statute of limitations was the decision covering January 1998 through September 2000. *See* Exhibit 3.

The Commission's rules then in effect provided that the Director's answer should allege "any conduct on which the respondent bases the action [here, the denial of a

refund], with sufficient specificity to enable the petitioner to address such allegations." 1 CSR 15.380(2)(E) (effective from Nov. 30, 2002 until Nov. 30, 2004). The answer does not allege any conduct by President — for example, the failure to submit a timely request for refund in accordance with § 144.190.2, or to obtain a waiver — that could have alerted President to a defense that the timeliness of its claim for a refund of sales taxes paid on comped food for January 1995 through November 1995 was at issue.

President was affirmatively misled by the absence of such allegations. Indeed, until the filing of the Director's supplemental brief on the statute of limitations seven days *after* the Commission's deadline, President had no idea that any period other than January 1998 through September 2000 was being questioned on statute of limitations grounds.

It is clear that taxpayers must raise all grounds in their claim for refund. *See, e.g.*, *Matteson v. Director of Revenue*, 909 S.W.2d 356, 360 (Mo. banc 1995). The rule should apply to both parties. The taxpayer could not raise the Director's untimely assessment of a tax without making such an allegation in its pleadings to the Commission and, accordingly, the Director should not be permitted to do it either.

III. *Conclusion*

The Director spends many words to state the obvious — the gaming tax is not identical to the sales tax. But this proves nothing. If the gaming tax and the sales tax were not different taxes, the gaming tax would have been enacted under Chapter 144. There would be no reason for the General Assembly to include the statutory language requiring the gaming tax to operate in the same manner as the sales tax.

The General Assembly directed that the gaming tax should "operate" in the same manner as the sales tax. That means that the resale exclusions apply. The Director cannot tax the comped food twice — once when the casino buys it, and again when the casino gives it to patrons as an award and inducement based on their level of play.

President's refunds were not barred by § 144.190.2 because the taxes it originally paid were use taxes, not sales taxes. President paid no sales taxes until 2002 and 2003. It filed its refund claims in 2003, well within the three-year period allowed by the statute.

For these reasons, President requests that the Court affirm the Commission's decision as to the comped food, direct a refund the sum of $506,379.06 of sales taxes assessed and collected on comped food, plus applicable interest, and to grant such other relief as the Court deems proper in the circumstances.

REPLY BRIEF

ARGUMENT

I. *The Purchase Of The Exclusive Right To Play A Slot Machine Or Occupy A Gaming Table Position Is A "Rental Agreement," And Thus The Amount Patrons Lose* Is *A Lease Payment That Is A "Sale At Retail"*

Most of the Director's arguments with regard to President's claim for a refund of the sales tax assessed and paid on slot machines and gaming equipment are discussed elsewhere and will not be repeated here.[3] She makes two points, however, that are flatly incorrect.

First, the Director says that President offered no evidence that its patrons were charged or paid any amounts to use the gaming equipment. Resp.Br. at 41. The casino's patrons pay for the exclusive right to play a slot machine or for a position at a gaming table, such as blackjack, through the amounts they lose. While some patrons will win more than they lose, the gaming business is built on the principle that over the long run the house will win. How much the house will win — such as at slots — may be adjusted from time to time, but the house will win. What the house wins is what Missouri law calls the adjusted gross receipts. And that is what the patrons pay to play.

For tax purposes, playing the slot machines, for example, is no different than playing a video game. When video game players use tokens they buy to play a video game, they

[3] *See* Point I in President's Cross-Respondent's Brief above.

"purchase the exclusive right to operate the video game machine for a term governed by the rules of the game. This is a rental agreement." *See Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 530 (Mo. banc 2003). That a person sitting at a video game plays Donkey Kong and gets a teddy bear if successful does not alter the fact it is no different legally than a person playing a slot machine who wins money instead of a plush toy. Both are rental agreements. The way in which the person pays for use of the machine is calculated differently, but both pay for the right to the exclusive use of the machine.

Second, the Director says that President is not entitled to the use tax exemption in § 144.518 RSMo 2000 because a slot machine is not a "coin-operated amusement machine." A slot machine is "coin-operated" within the meaning of the statute. That one can insert bills or play cards instead of coins into the machine does not take it out of the statute. One can do the same thing with vending machines and the Director surely is not saying that such devices are not covered by § 144.518. It is used for "amusement." What else is gaming except another, more highly regulated, mode of amusement?

The Director says that § 144.518 is not applicable because a casino pays a tax based on its adjusted gross receipts instead of its gross receipts. It is true that the gaming tax is imposed upon adjusted gross receipts — what the patron pays to play. But in this context "gross receipts" from a video game or vending machine are no different from the adjusted gross receipts the gaming tax is based on. As pointed out in the cases distinguishing occupational license taxes from sales taxes, the base upon which a sales tax is calculated

is the amount the customer actually pays. *See, e.g., Suzy's Bar & Grill, Inc. v. Kansas City*, 580 S.W.2d 259, 261, 263 (Mo. banc 1979).

Customers of vending machines pay only one price that includes the sales tax — just as a person would who bought a book at a bookstore. Similarly, a casino patron pays for the right to use the slot machine or for a position at the gaming table with his or her losses. Those losses — the casino's adjusted gross receipts — include the 20% gaming tax. The tax base for both video games and gaming devices is the same — what the customer actually pays to use it.

II. *The Statute Of Limitations In § 144.190 Does Not Bar A Refund For The First Quarter 1995 Because That Defense Was Not Timely Raised*

The Director asks this Court to approve her ambush tactics in raising the statute of limitations defense of § 144.190.2 for the first time in a supplemental brief filed after the deadline set by the Commission. She claims that the Director need not abide by the Commission's rules or its orders.

The rules require that her answer allege "any conduct on which the respondent bases the action [*e.g.*, denial of the refund for failure to obtain a limitations waiver] with sufficient specificity to enable the petitioner to address such allegations." 1 CSR 15.380(2)(E) (effective from Nov. 30, 2002 until Nov. 30, 2004). The Director's answer said: "Deny. Some, if not all, of Petitioner's refund applications were filled [*sic*] beyond

the three-year statute of limitations provided for in § 144.190. *See Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458, 462 (Mo. banc 2003)." L.F. 17.[4]

There is little doubt that such an allegation would be inadequate under the fact-pleading rules of the Missouri Rules of Civil Procedure to raise the lack of a written waiver of the limitations period. It is also inadequate under the Commission's rules. There is no allegation of any conduct by President that the Director now relies on — namely, the failure to obtain a waiver of the statute of limitations for the use taxes paid on gaming equipment for the first quarter 1995.

The Director says that President was not prejudiced because the issue was covered during both the first and second hearings. This is not true. The Director specifically raised the statute of limitations only as to the refund claim for food comps for the period January 1998 through September 2000. The references to the transcript in the first hearing are to Exhibit 3, the refund for food comps for this period. T-1, 43-44, 55, 56.

[4] The Director contends that President "waived" any objections to the filing of this answer, citing T-1, 76. *See also* T-1, 6-7. Due to a clerical error, the Director's answer was not filed with the Commission until the time of the hearing — several months late. T-1, 76. President received a service copy of the answer, and raised no objection at the hearing to the late filing. Apparently, the Director believes that this courtesy to opposing counsel is a "waiver" of anything that the answer says or does not say, and that President should have taken a default. This shows that no good deed goes unpunished.

There was no reference during the first hearing to any contention that the refund claim for gaming equipment for the first quarter 1995 was untimely.

The entire second hearing also dealt only with the food comps for January 1998 through September 2000. President introduced Exhibits 18-23, all of which related only to that subject. T-2, 84-91. The Director's counsel asked only about those exhibits, Exhibit 3 (the refund claim for that period), and a tax refund not at issue. T-2, 92-97. He never mentioned the gaming equipment or any fact that would support the contention the Director now makes about the lack of a statute of limitations waiver for the first quarter of 1995.

The first and only time the Director raised anything about the timeliness of the refund claim on gaming equipment for the first quarter 1995 was in a supplemental brief that was supposed to have been filed not later than January 27, 2006. S.L.F. 1-2. The Director filed her supplemental brief on February 3. L.F. 28. The Director does not even acknowledge in her Brief in this Court that she missed the deadline. She does not explain why that should not itself be deemed a waiver because she failed to comply with a Commission order.

Allowing the Director to base her defense to President's refund claim for use taxes paid on gaming equipment during the first quarter 1995 on a "supplemental brief" filed out of time would certainly prejudice a taxpayer. It would mean that the rules and the Commission's orders can be flouted at will by the Director, all in the name of sovereign immunity.

Finally, the Director's contention that there was no waiver of the limitations period in effect for the first quarter 1995 for gaming equipment is inconsistent with her position regarding use taxes on comped food for the same period. She refunded the use taxes paid on comped food for all of 1995, and assessed and collected (by an offsetting transaction) sales taxes for the period. *See* Exhibit 8.

CONCLUSION

President is entitled to a refund of the use tax it paid on slot machines and gaming equipment that it purchased between 1995 and 2002. President requests that the Court reverse the decision of the Administrative Hearing Commission in this respect, and order the Director to refund the use taxes paid on the slot machines and gaming equipment in the amount of $126,724.20, plus interest, and to grant such other relief as the Court deems proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 8,442 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing and a virus-free diskette were mailed, first class postage prepaid this ___ day of October 2006 to:

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